U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 10, 2000

CASE NO: 1999-INA-308

In the Matter of

DISCIPULOS INTERNACIONES
Employer

on behalf of

IVAN VALENCIA
Alien

Appearances: Candida S. Quinn, Esq., Attorney for Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Discipulos Internaciones' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On January 6, 1998, Employer filed a Form ETA 750 Application For Alien Employment Certification with the Maryland Department of Labor, Licensing and Regulation ("DLLR") on behalf of Alien, Ivan Valencia. (AF 17-18). The job opportunity was listed as "Caseworker". The job duties were described as follows:

> Counsel individuals and families affected by alcohol or drug abuse. Gather information about substance abuse, social, criminal, educational, vocational history. Plan, conduct individual and family counselling [sic] sessions and follow-up. Plan, conduct group counselling [sic] sessions. Make referrals to appropriate medical and other community resources. Plan, budget for, conduct outreach substance abuse prevention programs. * Overtime as required.

(AF 17). The stated job requirements for the position, as set forth on the application, included two years and six months in the related occupation of "Social services aide; asst. caseworker." (Id.). Other special requirements included: "Must speak fluent Spanish and be able to work with multicultural clientele. Must be sensitive to problems of substance abusers and their families. No smoking on employer's premises." (Id.).

On July 27, 1999, the CO issued a Notice of Findings ("NOF") in which he proposed to deny certification for two reasons. (AF 13-15). First, citing 20 C.F.R. 656.21(b)(5), the CO found that the Employer did not document that the requirement of two years and six months experience as a social services aide and assistant caseworker represent the Employer's actual minimum requirements for the job opportunity. (AF 14). The CO noted that Employer provided the Alien with the training and/or experience necessary to qualify for the job opportunity. The Employer was instructed to either: submit evidence that clearly shows that the Alien at the time of hire had the qualifications now required; submit

evidence that the Alien gained the required experience working for Employer in jobs which were not similar to the job for which alien labor certification is sought; submit evidence that it is not presently feasible due to business necessity to hire a worker with less than these qualifications and that the job as currently described existed before the alien was hired; or, to amend the application and re-advertise the position. (AF 14-15). Second, the CO found that Employer's advertisement did not meet the criteria for certification set forth in 20 C.F.R. 656.21(g). The CO found that the job opportunity was advertised under "S" for Substance Abuse Caseworker, instead of "C" for Caseworker, the location where most potentially qualified U.S. worker would look. (AF 15). The Employer was instructed that its Rebuttal must indicate its willingness to readvertise the position in accordance with the above instructions. (Id.).

Employer filed a rebuttal to the NOF of August 11, 1999. (AF 6-12). First, Employer asserted that the Alien gained the experience required for the caseworker position working in a different position from that which alien labor certification is sought. (AF 7). In support of this assertion, Employer described in detail the job duties for the position of Caseworker and those for the position of Assistant Caseworker. (AF 7-8). Second, Employer argued that recruitment for the Caseworker position was conducted in the manner specified by the Maryland Department of Labor, Licensing and Regulation. (AF 8a[1]). The Employer submitted documentation from the DLLR which shows that while Employer had proposed to advertise the position as a "Caseworker" the proposed advertisement was returned to them with the suggestion to advertise the position as a "Substance Abuse Caseworker." (AF 9-12). Employer asserted that "I think that it is unfair to require us to readvertise the position as 'Caseworker,' although if we have to we will. I also think that if we must readvertise, we should be compensated for the cost of the ad and for my time." (AF 8a).

The CO issued a Final Determination ("FD") on August 19, 1999, denying alien labor certification. (AF 4-5). The CO accepted Employer's rebuttal to the finding that the job requirements were not the actual minimum requirements for the job. (AF 5). The CO did not accept, however, Employer's offer to readvertise the position in accordance with the instructions set forth in the NOF. (Id). The CO stated that while the State agency personnel provide advice to employers and aliens, it is the CO who determines whether the requirements of the regulations were met and that employers and aliens should rely upon the information given by the CO when the NOF raises deficiencies inconsistent with the advice given by the State agency personnel. The CO found Employer's response was unacceptable because its "willingness" to readvertise was equivocal and contingent upon its demand for reimbursement of expenses. (Id).

The Employer requested a review of the denial of labor certification and a Motion for Reconsideration on September 17, 1999. (AF 1-3.) Employer argued that it did not intend to make its offer to readvertise contingent on reimbursement of the associated expenses and that the two sentences to this effect in the Rebuttal each contained an independent point. (AF 2). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. On October 28, 1999, Employer

[1]This page was not number in the Appellate file but is found between pages 8 and 9.

submitted its Statement of Position in which it again argued that its offer to readvertise was unequivocal and unconditional, and its request for reimbursement was distinct from the offer to readvertise, and that even if the offer had been contingent on reimbursement, the CO erred in denying Employer's application on a ground not raised in the NOF.

Discussion

Pursuant to section 656.21(g), and employer must advertise the job opportunity in a newspaper of general circulation or in a professional, trade or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified and available U.S. workers. The CO may specify advertisement requirements, including the location of the ad in the publication, to ensure that the labor market has been adequately tested. *See Riccardo di Capua*, 90-INA-489 (Dec. 23, 1991); *See also Wailua Associates*, 88-INA-533 (June 14, 1989) (CO properly concluded that employer did not adequately test labor market where advertisement appeared outside the "help wanted" section, between two legal notices and next to "Tickets for Sale or Wanted").

In this case, Employer advertised in the Washington Post under the heading "S" for "Substance Abuse (Caseworker)" as recommended by the state job service. In the NOF, the CO informed Employer that the advertisement should be listed under "C" for Caseworker rather than "S" in order to reach the most potentially qualified applicants. The CO specifically informed the Employer that its rebuttal must indicate a willingness to readvertise the position in accordance with the above instructions. (AF 15). In its rebuttal, the Employer explained that originally, Employer had proposed to advertise the position as "Caseworker" but that the state job service had suggested the change to "Substance Abuse (Caseworker)" and therefore Employer followed the state job service's instructions. (AF 8a). Employer expressed its frustration with the new advertising instructions but expressed a willingness to readvertise. In addition, Employer stated that "if we must readvertise, we should be compensated for the cost of the ad and for my time." (AF 8a). The CO interpreted this as an equivocal offer to readvertise contingent on the reimbursement of costs and therefore denied certification. (AF 5). On Appeal, Employer argues that this offer to readvertise was not contingent on the reimbursement of costs and that even if it was, the CO did not provide Employer an opportunity to respond to the finding that the contingent offer was contrary to the regulations.

Pursuant to Section 656.25(c), if a CO does not grant certification, the CO must issue a NOF stating the specific grounds for issuing the same. The Board has held that the NOF must give notice which is adequate to provide the Employer the opportunity to rebut or cure the alleged defects. *See Henry Khor*, 1999-INA-153 (Aug. 9, 1999); *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988) (*en banc*). The NOF must specify what the employer must show to rebut or cure the CO's findings; otherwise, the Employer is deprived of full opportunity to rebut. *See Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989).

Here, the CO provided specific notice to Employer that it must express its willingness to readvertise the position under "C" for "Caseworker." Employer did not attempt to rebut the CO's

finding but rather it expressed its frustration with the state agency for recommending Employer advertise under "Substance Abuse (Caseworker)". Employer did not argue that the CO should be bound by the state agency's recommendation but only pointed out its belief that this process was unfair and expressly stated: "if we have to [readvertise] we will."[2] (AF 8a). Employer argues that its offer to readvertise was not contingent on its request to be reimbursed for the costs of the ad. We agree and find that Employer's statement that it should be compensated for the readvertising costs was separate from its offer to readvertise. It seems unlikely that after taking the time to prepare the labor application, run the ad, and present in response to the NOF detailed supplementary information about the organization and its staffing that it would then condition the approval of the application on a relatively small amount of money. Employer's statement was that they "should be" compensated, not that they will only readvertise if compensated. In any event, the CO could have issued an order granting Employer's request to readvertise and stating that the Employer would not be compensated for these expenses. If the Employer was only interested in readvertising if it would also be reimbursed, Employer could have submitted a rebuttal saying as much. By interpreting the Employer's offer to readvertise as unequivocal and denying certification on this basis alone, the CO has denied Employer with the full opportunity to respond.

Accordingly, we vacate the FD and remand this case to the CO in order that the Employer be given the opportunity to readvertise the position in accordance with the regulations.

Order

The Certifying Officer's denial of certification is hereby vacated, and the case is REMANDED to the Certifying Officer for further proceedings consistent with this decision.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

[2] It is well settled that the CO is not bound by any statements or actions by the local employment service. *Peking Gourmet*, 88-INA-323 (May 11, 1989); *Aeronautical Marketing Corp.*, 88-INA-143 (Aug. 4, 1988).